(10)

Office - Supreme Court, U. S.
FILED
MAR 16 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943

No. 797

THE STARR PIANO COMPANY, PACIFIC DIVISION, a corporation,

Petitioner,

vs.

ETHEL STRICKLAND ROGAN, Executrix of the Last Will of Nat Rogan, Deceased,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

JOHN B. MILLIKEN,
L. A. LUCE,
808 Bank of America Building, Los Angeles,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and brief in support thereof 1

Opinions below 2

Jurisdiction 2

Statutes involved 2

Statement of facts 3

Decisions of District Court of the United States and United States Circuit Court of Appeals 6

Question presented 6

Specification of errors to be urged 7

Reasons relied on for the allowance of the writ 7

Brief in support of petition 8

1. The decision of the Circuit Court of Appeals herein is in direct conflict with the decision of Circuit Court of Appeals of the Second Circuit in Gutbro Holding Company v. Commissioner of Internal Revenue, 138 Fed. (2d) 16 8

2. The Circuit Court of Appeals has decided an important question of federal tax law which has not been but should be settled by this court 9

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Gutbro Holding Company v. Commissioner of Internal Revenue, 138 Fed. (2d) 16 ..... 7, 8, 9

STATUTES.

Civil Code of California, Div. First, Part IV, Title 1, Chap. XIII, Sec. 361 (1)(2)(3)(a)(b)(c)(d)(e)(f)(4)(5)(6)(7)

Judicial Code, Sec. 240(a), as amended by the Act of Feb. 13, 1925 (28 U. S. C., Sec. 347) 2

Revenue Act of 1934, Sec. 22(a) 7

Revenue Act of 1934, Sec. 111(a)(b)(c) 2, 7

Revenue Act of 1934, Sec. 112(a)(b)(3)(4)(g)(1) 2

Revenue Act of 1934, Sec. 112(h)(3) 7

Revenue Act of 1934, Sec. 113(a)(7) 2

Revenue Act of 1934, Sec. 115(c) 2, 7

..... 2, 5

INDEX TO APPENDIX.

PAGE

Statutes involved 1

Civil Code of California, Division First, Part IV, Title 1, Chapter XIII, Section 361 3

Revenue Act of 1934, Sec. 111 1

Revenue Act of 1934, Sec. 112 1

Revenue Act of 1934, Sec. 113 2

Revenue Act of 1934, Sec. 115 2

IN THE

Supreme Court of the United States

October Term, 1943

No. .....

THE STARR PIANO COMPANY, PACIFIC DIVISION, a corporation,

Petitioner,

vs.

ETHEL STRICKLAND ROGAN, Executrix of the Last Will of Nat Rogan, Deceased,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

The Starr Piano Company, Pacific Division, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on December 27, 1943, reversing a decision of the District Court of the United States in and for the Southern District of California, Central Division.

Opinions Below.

The minute order and memorandum decision, as well as the findings of fact and conclusions of law and judgment of the United States District Court, Southern District of California, Central Division, are unreported, but are contained in the transcript of record, pages 41 to 46, inclusive. The opinion of the Circuit Court of Appeals [R. 59-67] is reported in 139 Fed. (2d) 671.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 27, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347).

Statutes Involved.

In the appendix hereto are set forth the relevant statutory provisions:

Section 111 (a)(b)(c), Revenue Act of 1934, Appendix, page 1;

Section 112 (a)(b)(3)(4)(g)(1), Revenue Act of 1934, Appendix, pages 1 and 2;

Section 113 (a)(7), Revenue Act of 1934, Appendix, page 2;

Section 115 (c), Revenue Act of 1934, Appendix, pages 2 and 3;

Division First, Part IV, Title 1, Chapter XIII, Section 361 (1)(2)(3)(a)(b)(c)(d)(e)(f)(4)(5)(6)(7), of the Civil Code of California, Appendix, pages 3 to 7.

Statement of Facts.

The action below is an appeal from the decision of the United States District Court, Southern District of California, Central Division, in which judgment was entered on behalf of petitioner.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California with principal place of business located in the County of Los Angeles [R. 2]. During the months of February and March, 1921, petitioner entered into two ninety-nine year leases covering property situated in the City of Los Angeles [R. 20]. During the month of May, 1922, petitioner caused the Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California [R. 20]. The Gennett Realty Company was caused to be organized by petitioner for the purpose of holding legal title to the two leases it had acquired in February and March, 1921 [R. 20-21]. On July 17, 1922, petitioner transferred all its right, title and interest in the two leases aforesaid to Gennett Realty Company in exchange for all the capital stock of the latter [R. 21]. At all times during the existence of Gennett Realty Company petitioner owned all its issued and outstanding capital stock [R. 21]. On August 1, 1922, the Gennett Realty Company as lessor, and petitioner, as lessee, entered into a sublease of the property which petitioner had transferred to Gennett Realty Company. The lease was for a term of 15 years [R. 21]. During the year 1922 Gennett Realty Company issued its bonds in the amount of $200,000.00 for the purpose of raising funds to construct a building on one of the leases transferred to it by petitioner. The funds were actually raised and a building constructed [R. 21]. On July 1, 1923, Gennett Realty Company and petitioner as

lessors, entered into a sublease for a period of 25 years of the property on which the building aforesaid was constructed [R. 21]. On May 1, 1924, the sublease was extended to April 30, 1984. On May 1, 1924, Gennett Realty Company and petitioner, as lessors, entered into a sublease of the other property which petitioner had originally transferred to Gennett Realty Company, the term of the sublease being for a period of 60 years.

During the existence as a corporation of the Gennett Realty Company its directors and officers were persons employed by petitioner and who were actively engaged in activities carried on by petitioner. Gennett Realty Company had no office separate and apart from petitioner. Gennett Realty Company had no assets except the leases transferred to it by petitioner. Gennett Realty Company did not have a bank account. Gennett Realty Company had no employees other than its officers and directors who were employees of petitioner. All bookkeeping of the Gennett Realty Company was done by an employee of petitioner. All indebtedness of Gennett Realty Company was paid by check of the petitioner. All rentals due Gennett Realty Company were collected by a Los Angeles bank as trustee [R. 22-23].

For the years 1922, 1923 and 1924 petitioner and Gennett Realty Company filed separate corporate income tax returns. At all times during its existence, with the exception of the year 1934, Gennett Realty Company and petitioner filed consolidated corporate income and franchise tax returns. During the year 1934 petitioner transferred certain accounts to Gennett Realty Company to be collected in the name of Gennett Realty Company. Part of said accounts were collected in the name of Gennett

Realty Company. The uncollected accounts were transferred back to petitioner. Gennett Realty Company carried on no activities except as enumerated in this statement [R. 23].

During July and August, 1934, the Gennett Realty Company merged into petitioner. The merger was made in compliance with the provisions of Division First, Part IV, Title 1, Chapter XIII of the Civil Code of California.

The merger agreement was approved by the Board of Directors of Gennett Realty Company, the shareholders of Gennett Realty Company, the Board of Directors of petitioner and the shareholders of petitioner on July 31, 1934 [R. 27-34]. A certificate relating to the merger agreement was filed with the Secretary of State of the State of California on August 1, 1934, and the same certificate was filed with the County Clerk of the County of Los Angeles, in which county petitioner had its principal place of business on August 10, 1934 [R. 34-37]. A like certificate on the same dates was filed with the same officials on behalf of Gennett Realty Company [R. 23, 24, 25, 37-40].

Pursuant to the statutory merger all the assets of Gennett Realty Company became vested in petitioner and all liabilities of Gennett Realty Company were assumed by petitioner. All shares of stock of Gennett Realty Company, by virtue of the merger agreement, were surrendered to and cancelled by petitioner [R. 29-40].

The Commissioner of Internal Revenue determined that petitioner derived a taxable gain incident to the receipt by petitioner of property of Gennett Realty Company as a result of the statutory merger.

Decisions of District Court of the United States and United States Circuit Court of Appeals.

The District Court of the United States, Southern District of California, rendered judgment on October 3, 1942, in favor of the plaintiff for $73,557.08, plus interest, income and excess profits taxes for the year 1934 [R. 45-46]. The District Court held that plaintiff did not realize taxable gain by reason of the fact that in 1934, pursuant to an agreement of merger and consolidation under the California statutes The Starr Piano Company and its wholly owned subsidiary, Gennett Realty Company, both California corporations, were merged and consolidated into The Starr Piano Company. The United States Circuit Court of Appeals for the Ninth Circuit reversed the decision aforesaid of the District Court.

Question Presented.

Did The Star Piano Company realize a taxable gain by reason of the fact that during the year 1934, pursuant to an agreement of merger and consolidation under California statutes, The Starr Piano Company and its wholly owned subsidiary were merged and consolidated into The Starr Piano Company?

The additional question was also presented to both courts below of whether the corporate entity of the subsidiary should be disregarded for tax purposes but that question is neither here pressed nor presented.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In deciding that the statutory merger and consolidation resulted in a liquidation of the subsidiary resulting in taxable gain within the meaning of Section 115(c) of the Revenue Act of 1934.

(2) In deciding that the statutory merger and consolidation was not controlled by Section 112(h) (3) of the Revenue Act of 1934 and hence gave rise to neither taxable gain nor loss.

(3) In its failure to decide that there was no sale or other disposition of property resulting in taxable gain or loss under and pursuant to Section 111 of the Revenue Act of 1934.

(4) In its failure to decide that there was no sale or other disposition of property resulting in taxable gain or loss under and pursuant to Section 22(a) of the Revenue Act of 1934.

(5) In reversing the decision of the United States District Court.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein is in direct conflict with the decision of the United States Circuit Court of Appeals of the Second Circuit in *Gutbro Holding Company v. Commissioner of Internal Revenue*, 138 Fed. (2d) 16.
2. The Circuit Court of Appeals has decided an important question of Federal tax law which has not been but should be settled by this Court.

BRIEF IN SUPPORT OF PETITION.

1. The Decision of the Circuit Court of Appeals Herein Is in Direct Conflict With the Decision of Circuit Court of Appeals of the Second Circuit in Gutbro Holding Company v. Commissioner of Internal Revenue, 138 Fed. (2d) 16.

The basic issue presented to the Court below was whether a statutory merger and consolidation, under California statutes, gave rise to taxable gain or loss. The United States Board of Tax Appeals (now Tax Court of the United States) in *Gutbro Holding Company v. Commissioner*, 47 B. T. A. 374, had for decision the question of whether a statutory merger and consolidation under the New Jersey statutes, gave rise to gain or loss. The Board of Tax Appeals decided that gain or loss resulted. Its decision was appealed to the United States Circuit Court of Appeals for the Second Circuit and that Court reversed the decision of the Board of Tax Appeals.

The exact and identical provisions of the Revenue Act of 1934 were submitted for decision to the Circuit Court of Appeals for the Ninth Circuit in the case at bar and to the United States Circuit Court of Appeals for the Second Circuit in *Gutbro Holding Company v. Commissioner*, 138 Fed. (2d) 16, and the decisions of the two Circuit Courts of Appeals are directly opposed to each other and a definite, clear and unquestioned conflict in decisions has resulted.

The provisions of the New Jersey statutes relating to a merger and consolidation were the same as the basic provisions of the California statutes.

The Government in its brief filed in this cause with the United States Circuit Court of Appeals for the Ninth Circuit cited and specifically relied upon as direct authority for its position the decision of the United States Board of Tax Appeals in *Gutbro Holding Company v. Commissioner, supra,* which has now been reversed.

The United States Circuit Court of Appeals for the Ninth Circuit in its decision cites in two instances and specifically relies upon the decision of the Board of Tax Appeals in *Gutbro Holding Company v. Commissioner, supra,* which decision of the Board of Tax Appeals was reversed by the decision of the United States Circuit Court of Appeals for the Second Circuit.

It is respectfully submitted that the decision below does create a definite conflict with the decision of the Circuit Court of Appeals for the Second Circuit and such conflict should be settled by this Court.

2. The Circuit Court of Appeals Has Decided an Important Question of Federal Tax Law Which Has Not Been But Should be Settled by This Court.

All of the States of the Union provide in their statutory law for the merger and consolidation of parent and subsidiary corporations under and according to the form and pattern followed in the case at bar and as was done in *Gutbro Holding Company v. Commissioner, supra.* The determination of whether the same results in gain or loss and is controlled by the provisions of the revenue

statute relating to the liquidation of subsidiary corporations or is controlled by the provisions of the revenue statute providing for the recognition of neither gain nor loss is a most important question in the proper administration and enforcement of the federal revenue laws.

Counsel for petitioner certifies that in their opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

JOHN B. MILLIKEN,

L. A. LUCE,

Counsel for Petitioner.

March, 1944.

APPENDIX.

Statutes Involved.

Revenue Act of 1934.

Section 111. Determination of Amount of, and Recognition of, Gain or Loss.

(a) Computation of Gain or Loss.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in Section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount Realized.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) Recognition of Gain or Loss.—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of Section 112.

Section 112. Recognition of Gain or Loss.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss determined under Section 111, shall be recognized, except as hereinafter provided in this section

(b) Exchanges Solely in Kind.

(3) Stock for Stock on Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of

the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(g) Definition of Reorganization.—As used in this section and Section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation. * * *

Section 113. Adjusted Basis for Determining Gain or Loss.

(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

(7) Transfers to Corporation Where Control of Property Remains in Same Persons.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. * * *

Section 115. Distributions by Corporations.

* * * * * * * * *

(c) Distributions in Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated

as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under Section 111, but shall be recognized only to the extent provided in Section 112.

DIVISION FIRST, PART IV, TITLE 1, CHAPTER XIII, SECTION 361, OF THE CIVIL CODE OF CALIFORNIA.

"361. Merger and Consolidation of Corporations: (1) Approval by Board. Statements in Agreement. (2) Signatures. (3) Approval by Shareholders. Certificate of Contents. (4) Amendments to Agreements. (5) Filing of Agreement. (6) Surplus. (7) Separate Existence. Creditors' Rights.

"Any two or more corporations may be (a) merged into one of such constituent corporations, which is herein designated as 'the surviving corporation,' or (b) consolidated into a new corporation, which is herein designated as 'the consolidated corporation,' as follows:

(1) The board of directors of each corporation by resolution shall approve an agreement which shall set forth the terms and conditions of merger or consolidation, and the mode of carrying the same into effect, as well as the manner and basis of converting the shares of the constituent corporations into the shares of the consolidated or surviving corporation. The agreement may also provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares, to shareholders of the constituent corporations or any class of them; provided, however, that upon such distribution of cash, prop-

erty or securities, the liabilities of the consolidated or surviving corporation, including those derived by it from the constituent corporations, plus the amount of the stated capital of the consolidated or surviving corporation, shall not exceed the value of the assets of such consolidated or surviving corporation.

If the agreement is for a consolidation, it shall state the matters required to be stated in articles of incorporation and these statements shall be deemed to be the articles of the new or consolidated corporation.

If the agreement be for a merger, it shall state any matters with respect to which the articles of the surviving corporation are amended, and the articles shall be deemed to be amended accordingly upon the filing thereof with the secretary of state.

(2) The agreement shall be signed by the president or a vice-president and the secretary or an assistant secretary of each corporation, and acknowledged by the officers executing the same on behalf of their respective corporations.

(3) The agreement must be approved by the vote of the holders of not less than two-thirds of the issued and outstanding shares of each class, even though their right to vote be otherwise restricted or denied, of each of the constituent corporations, at a meeting duly called upon notice of the time, place and purpose thereof, duly given to each shareholder at least twenty days prior to the date of such meeting. There shall be mailed with the notice of such meeting a statement of the general terms of the proposed agreement. Different series of the same class of shares shall not be construed to constitute different classes of shares for the purposes of voting by classes.

The approval of the shareholders may be given either before or after the approval of the agreement by the board of directors.

After such approval by the directors and shareholders has been given, the president or a vice-president and the secretary or an assistant secretary of each corporation shall execute a certificate, which shall be verified by their oath and shall set forth:

(a) The time and place of the meeting of the board of directors;

(b) A copy of the resolution adopted thereat;

(c) The vote in favor of such resolution;

(d) The time and place of the meeting of the shareholders, and the total vote of each class of shares by which the agreement was approved;

(e) The total number of outstanding shares of each class;

(f) A statement of the mailing of the notice of the time, place and purpose of the meeting of the shareholders.

(4) Any amendment to the agreement may be adopted, and the agreement so amended may be approved, by like vote at such meeting of any of the constituent corporations, and if the agreement so amended be approved by like vote at such meeting and by the Board of directors of each of the constituent corporations, the agreement so amended shall be signed and acknowledged and shall have certified therewith the approval of the directors and of the shareholders in the same manner as provided for the original agreement, and shall then be considered the merging or consolidating agreement.

(5) The agreement so approved, executed and acknowledged and the certificates of its approval shall be filed with the secretary of state, and shall thereupon become effective, and the several parties thereto shall be one corporation. A copy of said agreement, certified by the secretary of state, shall be filed with the county clerks of the counties in which the principal office of each corporation is located and a copy of said agreement so certified shall be filed in the office of the county clerk of each county in which each corporation holds real property. A copy of such agreement or of a certified copy thereof certified by any official having custody thereof shall have the same force in evidence as the original, and, except as against the State shall be conclusive evidence of the performance of all conditions precedent to such consolidation or merger, and the creation or existence of the consolidated or surviving corporation.

(6) The surplus appearing on the books of the constituent corporations, to the extent to which it is not capitalized by the issue of shares or otherwise, may be entered as earned or paid-in surplus, as the case may be, on the books of the consolidated or surviving corporation, and may thereafter be dealt with as such.

(7) Upon the merger or consolidation, as provided herein, the separate existence of the constituent corporations shall cease, except that of the surviving corporation in case of merger, and the consolidated or surviving corporation shall succeed, without other transfer, to all the rights and property of each of the constituent corporations, and shall be subject to all the debts and liabilities of each, in the same manner as if the surviving or consolidated corporation had itself incurred them.

All rights of creditors and all liens upon the property of each of said former corporations shall be preserved unimpaired, limited in lien to the property affected by such liens immediately prior to the time of the consolidation or merger.

Any action or proceeding pending by or against any of such constituent corporations may be prosecuted to judgment, which shall bind the consolidated or the surviving corporation, or the consolidated or surviving corporation may be proceeded against or substituted in their place.

The directors of the corporation may, in their discretion, abandon such merger or consolidation subject to the rights of third parties under any contracts relating thereto, without further action or approval by the shareholders of the corporation, at any time before the merger or consolidation has been completed.—1933:1358."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Gutbro Holding Co. v. *Commissioner*, 138 F. 2d 16	4, 5
Helvering v. *Credit Alliance Co.*, 316 U. S. 107	5
Statutes:	
Civil Code of California (1941), Sec. 361	7
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 111	7
Sec. 112	7
Sec. 115	7
Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 112	5

580094—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 797

THE STARR PIANO COMPANY, PACIFIC DIVISION, A CORPORATION, PETITIONER

v.

ETHEL STRICKLAND ROGAN, EXECUTRIX OF THE LAST WILL OF NAT ROGAN, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 41–42) is unreported. The opinion of the Circuit Court of Appeals (R. 59–67) is reported in 139 F. 2d 671.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 27, 1943. (R. 68.) The petition for writ of certiorari was filed on March 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether taxpayer in 1934 realized taxable gain through the liquidation of its wholly owned subsidiary, the assets of which it received under a merger agreement executed pursuant to Section 361, Civil Code of California.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 7–9.

STATEMENT

The District Court adopted the written stipulation of facts (R. 43) which insofar as here relevant may be summarized as follows:

In 1921 taxpayer as lessee entered into two ninety-nine-year leases covering properties in Los Angeles, California (R. 20). In May 1922 taxpayer caused to be incorporated under the laws of California the Gennett Realty Company (hereinafter called Gennett) for the purpose of holding legal title to the leases. Taxpayer thereupon transferred to Gennett all its right, title, and interest in the leases in exchange for Gennett's entire capital stock. At all times during Gennett's existence, taxpayer owned all of Gennett's stock. (R. 20–21.)

During July and August 1934, Gennett merged into taxpayer under an agreement entered into pursuant to the laws of California (R. 23–24). The agreement provided that taxpayer should be

and become the surviving corporation and that (R. 29)—

> All of the assets of Gennett Realty Company of every kind or nature, both real and personal, wheresoever situated, shall *ipso facto,* by virtue of this merger agreement, be and become vested in The Starr Piano Company (Richmond, Indiana), Pacific Division.

Taxpayer assumed and agreed to pay all of Gennett's debts, liabilities, and obligations (R. 31). All outstanding shares of Gennett's stock were to be cancelled *ipso facto* by virtue of the agreement and the holders were to surrender the same to the secretary of taxpayer for cancellation. The outstanding shares of taxpayer's stock were unaffected by the agreement. (R. 31.) The assets of Gennett were merged into and acquired by the taxpayer, and Gennett's debts assumed as of August 1, 1934 (R. 31).

The taxpayer sued the Collector of Internal Revenue to recover $73,557.08, plus interest, as income and excess-profits taxes paid for 1934 (R. 2–9). It was stipulated that the assessments were occasioned solely by the Commissioner's determination that gain or loss was recognizable for tax purposes, upon receipt by taxpayer of the property through the merger. If gain or loss was properly recognizable, taxpayer was not entitled to recover. If it was not recognizable,

taxpayer was entitled to recover. (R. 26.) There was no controversy over either the basis of the stock, the value of the assets received, or the computation of the amount of the gain.

The District Court held no gain or loss resulted through the merger, and that it was a nontaxable exchange under the provisions of Section 112 (b) (4) of the Revenue Act of 1934 (R. 41–42). Upon appeal the Circuit Court of Appeals reversed (R. 58–67).[1]

ARGUMENT

The case was correctly decided and there is no conflict.

Gutbro Holding Co. v. *Commissioner,* 138 F. 2d 16 (C. C. A. 2d), which is asserted to be in conflict, did not present the same question. In that case the taxpayer was organized to take over the assets of two existing corporations. Since the court held that the transferee was a new corporation, the transaction could not be a liquidation because the transferee was not a stockholder of the transferring corporation. Here it is agreed that taxpayer was the sole stockholder of the Gennett Realty Company (R. 21), and it is thus apparent that its relationship to the transaction is quite different from the relationship of *Gutbro* to the transaction involved in that case. It fol-

[1] Pending the appeal the Collector of Internal Revenue died and his executrix was substituted as a party.

lows, of course, that the *Gutbro* decision dealing with a nonstockholder is not in point when considering the position of the stockholder in the case at bar.

The court below correctly held that Section 112 (b) (3) is not applicable because there was no exchange of stock or securities in the Gennett Realty Company for stock or securities in the taxpayer. While the *Gutbro* opinion (p. 20) held that the statute was satisfied by charging the new corporation with the same stock liability that it would have had if new certificates had been issued, that decision cannot be applicable where, as here, there is no new corporation. Since the taxpayer already owned the Gennett stock, it would have been impossible for it to have issued its own stock in exchange therefor. Accordingly, unlike the *Gutbro* case (p. 20), the failure to issue the stock here is not a mere omission of "the useless handling of the pieces of paper * * *."

The question presented is not of present importance, since the Revenue Act of 1936 introduced a new policy of making distributions to parent corporations nontaxable. See Section 112 (b) (6), Revenue Act of 1936, c. 690, 49 Stat. 1648. *Helvering* v. *Credit Alliance Co.*, 316 U. S. 107, 112.

CONCLUSION

The decision of the lower court is correct and does not present a conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
HOMER R. MILLER,
Special Assistants to the Attorney General.

APRIL 1944.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

* * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of Corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117 (a), 100 per centum of the gain so recognized shall be taken into account in computing net income.

Civil Code of California (1941):

§ 361. MERGER AND CONSOLIDATION OF CORPORATIONS. Any two or more corporations may be (a) merged into one of such constituent corporations, which is herein designated as "the surviving corporation," or (b) consolidated into a new corporation, which is herein designated as "the consolidated corporation," as follows:

* * * * *

(7) [Cessation of Separate Existences.] Upon the merger or consolidation, as provided herein, the separate existence of the constituent corporations shall cease, except that of the surviving corporation in case of merger, and the consolidated or surviving corporation shall succeed, without other

transfer, to all the rights and property of each of the constituent corporations, and shall be subject to all the debts, and liabilities of each, in the same manner as if the surviving or consolidated corporation had itself incurred them.

All rights of creditors and all liens upon the property of each of said former corporations shall be preserved unimpaired, limited in lien to the property affected by such liens immediately prior to the time of the consolidation or merger.

U. S. GOVERNMENT PRINTING OFFICE: 1944